

BEFORE THE PERSONNEL APPEALS BOARD

STATE OF WASHINGTON

MICHAEL BEIRENS,  
Appellant,  
v.  
WASHINGTON STATE UNIVERSITY,  
Respondent.

) Case No. DEMO-03-0022  
)  
) FINDINGS OF FACT, CONCLUSIONS OF  
) LAW AND ORDER OF THE BOARD  
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I. INTRODUCTION

1.1 **Hearing.** Pursuant to RCW 41.64.060 and WAC 358-01-040, this appeal came on for hearing before the Personnel Appeals Board, GERALD L. MORGEN, Vice Chair. The hearing was held at the Washington State University, Compton Union Building, Pullman, Washington, on July 14, 2004. BUSSE NUTLEY, Member, listened to the recorded proceedings, reviewed the file and exhibits and participated in this decision.

1.2 **Appearances.** Appellant Michael Beirens appeared *pro se*. Donna Stambaugh, Assistant Attorney General, represented Respondent Washington State University.

1.3 **Nature of Appeal.** This is an appeal from a disciplinary sanction of demotion for neglect of duty, malfeasance, gross misconduct, and willful disregard for state law and university policy for misuse of university resources.

## II. FINDINGS OF FACT

2.1 Appellant Michael Beirens is a Custodian and permanent employee for Respondent Washington State University (WSU). Appellant and Respondent are subject to Chapters 41.06 and 41.64 RCW and the rules promulgated thereunder, Titles 251 and 358 WAC. Appellant filed a timely appeal with the Personnel Appeals Board on August 25, 2003.

2.2 Appellant began his employment with WSU, Facilities Operations department, in 1994. Appellant has been the subject of prior disciplinary action, including a letter dated April 1, 2002, imposing a 14-day suspension for misuse of the University's computers and internet system during work hours. The letter warned Appellant, "incidents of similar or other inappropriate behavior may be grounds for further disciplinary action ... " Appellant was provided with University Policy 20.35, which informs employees that WSU facilities and equipment are for official use only subject to limited exceptions.

2.3 By letter dated July 8, 2003, Lawrence E. Davis, Executive Director of Facilities Operations, notified Appellant of a pre-disciplinary meeting scheduled for July 14, 2003, to discuss Appellant's suspected misuse of state resources, including misuse of his computer and the internet, between the time period of February 22, 2003 and May 1, 2003, including:

- email from 3 separate hotmail email accounts;
- news articles from various sources;
- product advertisements;
- commentaries from various authors;
- message boards; and
- dating services such as Kiss.com and matchmaker.com

1 2.4 Mr. Davis reviewed a hard copy of the report he received from the police department listing  
2 temporary internet files found on Appellant's work computer hard drive. During the meeting on  
3 July 14, Appellant admitted he used his work assigned computer and the internet for personal  
4 reasons. Appellant also acknowledged his awareness of WSU business policy 20.35 that prohibits  
5 the use of University property for personal gain or for purposes unrelated to official University  
6 activities.

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8 2.5 After concluding Appellant engaged in misconduct, Mr. Davis determined that disciplinary  
9 sanction was necessary. To determine the appropriate level, Ms. Davis reviewed a letter from  
10 Appellant in response to the notice of investigation and he considered Appellant's responses on July  
11 14, 2003. After considering Appellant's response to the charges, Mr. Davis did not believe  
12 Appellant presented any mitigating facts for his behavior. Mr. Davis considered several  
13 disciplinary actions, including dismissal. However, because Appellant was close to retirement he  
14 believed that retaining Appellant in a position with no access to a computer was more appropriate  
15 than dismissal. Mr. Davis concluded that demotion was appropriate based on Appellant's history of  
16 misusing state resources for personal benefits.

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18 2.6 By letter dated July 23, 2003, Mr. Davis notified Appellant of his demotion from his  
19 position as a Construction Coordinator to a position as a Custodian, effective August 11, 2003. Mr.  
20 Davis charged Appellant with neglect of duty, malfeasance, gross misconduct, and willful violation  
21 of policy when he, between February 22 and May 1, 2003, engaged in misuse of University  
22 property during work hours by using his computer and the internet for personal reasons.

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24 2.7 Appellant does not dispute that he engaged in use of the University's computer and internet  
25 service for non-business purposes.  
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### III. ARGUMENTS OF THE PARTIES

3 3.1 Respondent asserts that Appellant engaged in extensive misuse of university computers for  
4 personal reasons to view numerous sites that were not work related. Respondent contends that  
5 Appellant admitted to the behavior and his awareness of the policies regarding proper use of  
6 University property. Respondent argues that Appellant had received prior warnings regarding  
7 proper use of university property and received a two-week suspension for misuse of the  
8 University's computers. Respondent argues that Appellant's misconduct between February 22 and  
9 May 1, 2003 for again misusing state resources warrants a demotion.

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11 3.2 Appellant does not dispute the charges and he asserts that he made a mistake. Appellant  
12 contends that his use of the computers occurred during his rest periods and lunch breaks and did not  
13 diminish his work performance. Appellant contends that he had a good performance record and the  
14 demotion was too severe.

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### IV. CONCLUSIONS OF LAW

17 4.1 The Personnel Appeals Board has jurisdiction over the parties and the subject matter.

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19 4.2 In a hearing on appeal from a disciplinary action, Respondent has the burden of supporting  
20 the charges upon which the action was initiated by proving by a preponderance of the credible  
21 evidence that Appellant committed the offenses set forth in the disciplinary letter and that the  
22 sanction was appropriate under the facts and circumstances. WAC 358-30-170; WAC 251-12-  
23 240(1); Baker v. Dep't of Corrections, PAB No. D82-084 (1983).

1 4.3 Neglect of duty is established when it is shown that an employee has a duty to his or her  
2 employer and that he or she failed to act in a manner consistent with that duty. McCurdy v. Dep't  
3 of Social & Health Services, PAB No. D86-119 (1987).

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5 4.4 Gross misconduct is flagrant misbehavior which adversely affects the agency's ability to  
6 carry out its functions. Rainwater v. School for the Deaf, PAB No. D89-004 (1989). Flagrant  
7 misbehavior occurs when an employee evinces willful or wanton disregard of his/her employer's  
8 interest or standards of expected behavior. Harper v. WSU, PAB No. RULE-00-0040 (2002).

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10 4.5 Willful violation of published employing agency or institution or Personnel Resources  
11 Board rules or regulations is established by facts showing the existence and publication of the rules  
12 or regulations, Appellant's knowledge of the rules or regulations, and failure to comply with the  
13 rules or regulations. Skaalheim v. Dep't of Social & Health Services, PAB No. D93-053 (1994).

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15 4.6 Appellant admits he misused University property when he used his computer and the  
16 internet for personal reasons. Appellant was also aware of his duty and responsibility to use the  
17 University's resources for work related purposes only, and he neglected that duty as reflected by his  
18 extensive personal use of his computer and the internet. Respondent has met its burden of proof  
19 that Appellant neglected his duty when he used his computer and the internet for non-work related  
20 purposes during work time. Respondent has further met its burden of proving that Appellant  
21 willfully violated WSU Policy 20.35 when he repeatedly accessed the internet for personal purposes  
22 during work hours. In this case, Appellant was previously disciplined in the form of a suspension  
23 for misuse of University property, and he was warned that future misconduct of a similar nature  
24 would result in further disciplinary action. Appellant was clearly on notice that his behavior would  
25 not be tolerated and his continued misuse of University property rises to the level of gross  
26 misconduct.

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2 4.7 Malfeasance is the commission of an unlawful act, the act of doing what one ought not to  
3 do, or the performance of an act that ought not to be done, that affects, interrupts, or interferes with  
4 the performance of official duty. Parramore v Dep't of Social & Health Services, PAB No. D94-  
5 135 (1995).

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7 4.8 Respondent has failed to prove by a preponderance of the evidence that Appellant's use of  
8 the internet affected, interrupted or interfered with the performance of an official duty. Therefore,  
9 Respondent failed to meet its burden proving that Appellant's misconduct constituted malfeasance.

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11 4.9 Although it is not appropriate to initiate discipline based on prior formal and informal  
12 disciplinary actions, including letters of reprimand, it is appropriate to consider them regarding the  
13 level of the sanction which should be imposed here. Aquino v. University of Washington, PAB No.  
14 D93-163 (1995).

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16 4.10 In determining whether a sanction imposed is appropriate, consideration must be given to  
17 the facts and circumstances, including the seriousness and circumstances of the offenses. The  
18 penalty should not be disturbed unless it is too severe. The sanction imposed should be sufficient to  
19 prevent recurrence, to deter others from similar misconduct, and to maintain the integrity of the  
20 program. Holladay v. Dep't of Veterans Affairs, PAB No. D91-084 (1992).

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22 4.11 Based on Appellant's prior suspension for similar misconduct and his failure to correct his  
23 behavior, we conclude that demotion was the appropriate sanction and is sufficient to prevent  
24 recurrence, deter others from similar misconduct and to maintain the integrity of Respondent's  
25 program.

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**V. ORDER**

NOW, THEREFORE, IT IS HEREBY ORDERED that the appeal of Michael Beirens is denied.

DATED this \_\_\_\_\_ day of \_\_\_\_\_, 2004.

WASHINGTON STATE PERSONNEL APPEALS BOARD

\_\_\_\_\_  
Gerald L. Morgen, Vice Chair

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Busse Nutley, Member